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CATHY A. CATTERSON
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| PARK ELECTROCHEMICAL CORP, a New York corporation, et al.,<br><br>Plaintiffs - Appellees,<br><br>v.<br><br>DELCO ELECTRONICS CORPORATION, a Delaware corporation,<br><br>Defendant - Appellant. | No. 01-15326<br><br>D.C. No. CV-98-00777-OMP<br><br>MEMORANDUM* |
| PARK ELECTROCHEMICAL CORP, a New York corporation,<br><br>Plaintiff,<br><br>and,<br><br>NELCO TECHNOLOGY, INC., an Arizona corporation,<br><br>Plaintiff - Appellant,<br>v. | No. 01-15690<br><br>D.C. No. CV-98-00777-OMP |

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

DELCO ELECTRONICS CORPORATION,
a Delaware corporation,

Defendant - Appellee.

Appeal from the United States District Court
for the District of Arizona
Owen M. Panner, Senior Judge, Presiding

Argued and Submitted December 2, 2002
San Francisco, California

Before: NOONAN, BERZON and TALLMAN, Circuit Judges.

We affirm the jury verdicts on appeal, as well as the denial of Nelco's attorneys fees. We reverse the denial of Nelco's costs. Because the facts are familiar to the parties, we recount them only as necessary to explain our decision.

1. The district court did not prejudice Nelco by refusing its request to modify the jury instructions on the breach of contract claim. The additional sentence Nelco requested simply repeated, in slightly different words, the explanation contained in the jury instructions given. That instruction stated that the buyer could not "reduce or eliminate its requirements solely to avoid its contract with the seller." The instruction thereby limited the "legitimate business reason" referred to in the next sentence of the instruction in very much the same manner as the sentence Nelco sought to add. Nelco could not have been

prejudiced by the district court's refusal to adopt Nelco's language. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 806 (9th Cir. 2001) (absent prejudice from instructional error, new trial not warranted).

2. Because the jury found for Delco on the breach of contract claim, Delco argues, Delco cannot be liable on the good faith claim. Embedded within that argument are two distinct issues:

(a) Instructional Error

First, Delco appears to argue that the trial court erred in submitting to the jury distinct instructions on both the breach of contract claim and the breach of good faith claim. Delco, however, never objected to the jury instruction separately setting forth the good faith claim; indeed, Delco offered the instruction. Thus, Delco cannot now complain that the instruction was improper. Fed. R. Civ. P. 51; s*ee also Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336 (9th Cir. 1985).

(b) Inconsistent Verdicts

Whether Delco's failure to object to the covenant of good faith and fair dealing instruction also waived its right to object to inconsistent verdicts is an issue we need not, and do not, decide. Even if we reach it, Delco's inconsistency claim fails.

Consonant with our Seventh Amendment duty to honor jury verdicts, we must uphold a judgment against a challenge of inconsistent verdicts "if it is possible to reconcile the verdicts on any reasonable theory consistent with the evidence." *Vaughan v. Ricketts*, 950 F.2d 1464, 1470 (9th Cir. 1991). Where, as here, Delco has waived any objection to the form of the instruction, we analyze the verdicts in light of the instructions actually given. *Id.* (considering verdicts "in light of the judge's instructions to the jury.") (quoting *Toner v. Lederle Laboratories*, 828 F.2d 510, 512 (9th Cir. 1987)).

Applying this standard, the verdicts can be readily reconciled. The breach of contract instruction spoke to the possibility that Delco breached the extension agreement by deciding to close the circuit board plant and thereby terminate the requirements contract. The breach of good faith verdict, in contrast, spoke in more general terms, requiring that "neither party do *anything* that prevents the other from receiving the benefits to which it is entitled under the contract." (emphasis added).

The jury could have concluded that Delco acted in bad faith in the manner in which it implemented its decision to close the circuit board plant. Evidence supported the conclusion that Delco failed to inform Nelco of the final plant closure decision until March 1998, three months prior to placing its last order,

even though Delco came to a final closure decision significantly earlier. Evidence also supported the conclusion that Delco had a good faith duty to provide a longer transition period.

There was also evidence supporting the inference that Nelco was damaged by the shortened transition period. Nelco witness Smoot testified that Nelco did not line up alternate customers nor even begin its attempts to do so until late 1997. In both its opening and closing argument, Delco highlighted this issue, disparaging Nelco for "putting all its eggs in one basket," and for not "trying to take care of what might happen in the eventuality of CBF closing." Rather than blame Nelco for failing to hedge its bets, however, the jury could have concluded that Delco deserved much of the blame, for failing to provide timely notice of its decision to close the plant.

An internal Nelco document further suggested that once Nelco officially learned of the plant closure, it had to scramble to "retool" its factory, acquire new talent, refocus its sales energy, and do so all with a "sense of urgency." According to Delco's economist, these efforts eventually bore fruit, in that Nelco was able to replace a large portion of the lost Delco business. As it was a permissible inference that Nelco could have replaced Delco volume sooner than it did had it received adequate notice, the jury could properly award Nelco lost profits for the

period during which Nelco operated without the benefit of either Delco orders or replacement business. The amount of the jury award – substantially less than Nelco's request for approximately $56 million, representing lost profit for the entire period of the extension contract – supports our reconciliation of the jury verdict.

The breach of good faith verdict is also consistent with the jury's verdict for Delco on Nelco's negligent misrepresentation claim. The instructions relevant to the negligent misrepresentation claim focused on Delco's duty to disclose material facts *prior* to the formation of the extension agreement:

> Concealing the truth of a material matter is a representation of false information where the concealing party has a duty to disclose the truth of the material matter. A party to a contract has a duty to disclose facts *if the party knows that the other party is about to enter into the contract* under a mistake regarding facts basic to the contract . . .

(emphasis added). As we have explained, the breach of good faith claim could reasonably rest on Delco's conduct after the formation of the extension agreement.

3. Even if the district court erred in failing to give a limiting instruction regarding certain oral promises Delco allegedly made to Nelco prior to the execution of the extension agreement, that error was harmless. The jury found in

favor of Delco on the claims related to Delco's pre-extension agreement conduct.

For similar reasons, even if the district court improperly excluded evidence regarding the continuing operation of Delco's Flint plant, that error was harmless. The Flint Plant evidence rebutted Nelco's assertion that Delco had come to a final decision to close the Kokomo circuit board plant prior to the execution of the extension agreement. Because the fraud and negligent misrepresentation verdicts indicate that the jury found in favor of Delco with respect to the pre-extension agreement conduct, Delco suffered no prejudice.

We also find no prejudicial error in the district court's decision to preclude Mr. Weekly from summarizing the factors reducing Mr. Weinstein's damage estimate. The jury was well-equipped to assess the cumulative impact of Weekly's impeachment evidence on its own.

None of Delco's other evidentiary objections require a new trial nor an extended discussion.

4. The district court abused its discretion in refusing to award costs to Nelco. We need not decide whether Arizona or federal law apply to this question. Under Arizona law, the district court has no discretion to deny costs. Under Fed. R. Civ. P. 54(d)(1) "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Rule 54(d)(1) establishes

a presumption in favor of awarding costs to the prevailing party. *Association of Mexican-American Educators v. California,* 231 F.3d 572, 593 (9th Cir. 2000). The district court may alter this presumption only by "explain[ing] why a case is not 'ordinary' and why, in the circumstances, it would be inappropriate or inequitable to award costs." *Id.*

The district court noted that the issues were close and that Nelco did not prevail on every claim. A partial victory after a well-argued trial is hardly unusual. Nelco's victory was neither nominal nor pyrrhic: Nelco received over $32 million in damages. Under the circumstances, focusing on the fact that Nelco prevailed on only one of four claims and did not recover punitive damages misapprehends the nature of Nelco's victory. The district court therefore abused its discretion in denying costs.

5. The district court did not, however, abuse its discretion in denying Nelco its attorneys' fees. The award of attorney fees is governed by Arizona law. *Kona Enterprises Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000). In a contract action under Arizona law, "the court *may* award the successful party reasonable attorney fees." A.R.S. § 12-341.01(A) (emphasis added).

Contrary to the cost rule above considered, the language of this statute is permissive and does not establish a presumption that fees will be awarded.

*Associated Indemnity Corp. v. Warner*, 694 P.2d 1181, 1183 (Ariz. 1985); *Wildwood Hills Mobile Home Park v. Arizona Dept. of Build. & Fire*, 885 P.2d 131, 138 (Ariz. Ct. Ap. 1994). Rather, the trial court has "broad" discretion to grant or deny a fee request. *Paloma Inv. Ltd P'ship v. Jenkins*, 978 P.2d 110, 116 (Ariz. Ct. Ap. 1999).

The trial court duly considered the factors stated in *Associated Indemnity Corp.*, 694 P.2d at 1184 and *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025, 1049 (Ariz. 1985) *abrogated on other grounds by* A.R.S. §23-1501 *et. seq.*, and determined that two factors justified its decision to deny Nelco's request. Although the district court did not individually analyze each factor, it need not do so. *See State Farm Auto. Ins. v. Dressler*, 738 P.2d 1134, 1139 (Ariz. Ct. App. 1987) (trial court need not state reasons for its ruling on application for discretionary award of attorney's fees).

Although the issue is close, we conclude that the district court did not abuse its broad discretion. *See Main I Ltd. P'ship v. Venture Cap. Constr.*,741 P.2d 1234, 1239 (Az. App. 1239) (trial court decision to grant attorneys fees upheld "even if there were other factors that might have supported a decision to deny attorneys fees.")

**CONCLUSION**

The verdicts are **AFFIRMED.** The denial of attorney fees is **AFFIRMED**. The denial of costs is **REVERSED AND REMANDED.**